

OPINION AFTER TRANSFER FROM THE CALIFORNIA SUPREME COURT

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KHARY WATSON,

Defendant and Appellant.

D069324

(Super. Ct. Nos. SCD215231,
HC20480)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Dismissed as moot.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Theodore M. Cropley and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

On August 29, 2018, the Supreme Court transferred this case to us with directions to consider whether the matter is rendered moot in light of Senate Bill No. 394, signed into law October 11, 2017. The Attorney General contends it is, because the statutory amendments put into effect by Senate Bill No. 394 remedy any constitutional violations alleged by defendant Khary Watson. Watson contends none of the eight issues he identified in his petition to the Supreme Court¹ is made moot by Senate Bill No. 394. We disagree with Watson and dismiss the matter as moot.

¹ The eight issues stated in Watson's petition to the Supreme Court are as follows: "1. Whether the Eighth Amendment to the United States Constitution, as interpreted by *Miller v. Alabama* (2012) 567 U.S. [460] [132 S.Ct. 2455], and *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718], *Graham v. Florida* (2010) 560 U.S. 48, and *Roper v. Simmons* (2005) 543 U.S. 551, categorically bans life-without-parole sentences for juveniles who commit criminal homicide, especially felony-murder[; ¶] 2. Whether Penal Code section 190.5 [subdivision] (b), which authorizes sentencing courts to exercise "discretion" to impose life-without-parole sentences, violates the Eighth Amendment to the United States Constitution, as interpreted by *Miller v. Alabama* (2012) 567 U.S. [460] [132 S.Ct. 2455] and *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718][; ¶] 3. Whether the Eighth Amendment to the United States Constitution, as interpreted by *Miller v. Alabama* (2012) 567 U.S. [460] [132 S.Ct. 2455] and *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718], creates a presumption in favor of life with parole sentences for juvenile homicide offenders[; ¶] 4. Whether Watson's life-without-parole sentence for a crime of robbery-felony murder committed while he was a minor violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as interpreted by *Miller v. Alabama* (2012) 567 U.S. [460] [132 S.Ct. 2455] and *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718][; ¶] 5. Whether California's scheme for charging minors with special circumstance murder in adult court and the Penal Code section 190.5 [subdivision] (b) punishment of life-without-parole violate the Eighth Amendment to the United States Constitution, as interpreted by *Miller v. Alabama* (2012) 567 U.S. [460] [132 S.Ct. 2455] and *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718][; ¶] 6. Whether California's statutory scheme for charging and trying minors in adult court and punishing them with life-without-parole special circumstance murder violates equal protection of the laws under the Fourteenth Amendment to the United States Constitution[; ¶] 7. Whether Penal Code section 190.5 [subdivision] (b) violates equal protection of the laws

FACTUAL AND PROCEDURAL BACKGROUND

Around 10:00 p.m. on October 1, 1994, Patricia L. was walking with a friend toward her apartment when Watson came out of the bushes, pointed a gun at Patricia L.'s friend, and directed her to remove her fanny pack, which the friend did. (*People v. Watson* (2017) 8 Cal.App.5th 496, 501.) As this was occurring, Patricia L. began running toward her apartment. (*Id.* at p. 502.) Watson ran after her, grabbed her, and shot her. (*Ibid.*) Patricia L. died at the scene. (*Id.* at p. 501.) Watson was 17 years eight months old at the time. (*Id.* at p. 504.) He told an accomplice he picked up the shell casing and, when asked why he shot Patricia L., Watson responded, " ' "Because the bitch bit me." ' " (*Id.* at p. 502.) The murder remained unsolved until after 2006, when the police received an anonymous phone call that led them to one of Watson's accomplices. (*Ibid.*)

A jury found Watson guilty of first degree murder with personal use of a firearm and with the special circumstance of murder during the commission or attempted commission of robbery, and the court sentenced Watson to life without the possibility of parole (LWOP). (*People v. Watson, supra*, 8 Cal.App.5th at p. 503.) Watson appealed, and the judgment was affirmed. (*Ibid.*)

"In his third petition for a writ of habeas corpus, Watson claimed his LWOP sentence violated the Eighth Amendment as well as *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) and *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). An order to

under the Fourteenth Amendment to the United States Constitution[; and ¶] 8. Whether Penal Code section 190.5 [subdivision] (b) violates due process protection under the Fourteenth Amendment to the United States Constitution and the California Constitution?"

show cause was issued. [¶] The People conceded that Watson was entitled to a new sentencing hearing. [¶] The superior court subsequently granted the requested relief in part and ordered a new sentencing hearing under Penal Code section 190.5, subdivision (b) as well as *Miller, supra*, 567 U.S. 460, and *Gutierrez, supra*, 58 Cal.4th 1354.²

"The same superior court judge who presided over Watson's trial and sentencing after that trial handled Watson's resentencing hearing. As an initial matter, the judge informed the parties that she had erred in sentencing Watson under [Penal Code] section 190.2, subdivision (a)(17) instead of [Penal Code] section 190.5, subdivision (b) because he was 17 years old at the time he committed the subject crime. In addition, the judge indicated, to prepare for the hearing, she read the People's sentencing memorandum, Watson's statement in mitigation, Watson's motion to apply *Miller, supra*, 567 U.S. 460 and *Gutierrez, supra*, 58 Cal.4th 1354 retroactively, her notes from the trial, and several of the cases cited by the parties, including *Miller* and *Gutierrez*." (*People v. Watson, supra*, 8 Cal.App.5th at p. 503.)

The judge conducted a thorough resentencing hearing, during which she heard arguments from the People, Watson's attorney, and victims of the night's events. (*People v. Watson, supra*, 8 Cal.App.5th at p. 504.) The court also considered the relevant *Miller* factors in rendering its opinion, as detailed in our previous opinion in this matter. (*People v. Watson*, at pp. 504-508.) Watson appealed, and we issued a published

² We take the procedural facts from our previous opinion in this matter, *People v. Watson, supra*, 8 Cal.App.5th 496.

opinion affirming the trial court's sentence to life in prison without the possibility of parole. (*Id.* at pp. 508, 520.) In so doing, we concluded the sentence did not violate the Eighth Amendment or run afoul of Watson's equal protection or due process rights. (*People v. Watson*, at pp. 513, 516-520.) Our high court granted Watson's petition for review, but it deferred the matter pending consideration and disposition of the related issues in *People v. Padilla* (Jan. 25, 2017, S239454) __ Cal.5th __ [2017 Cal. LEXIS 606] (*Padilla*) and *People v. Arzate* (Jan. 25, 2017, S238032) __ Cal.5th __ [2017 Cal. LEXIS 604] (*Arzate*),³ or pending further order of the Supreme Court. (*People v. Watson* (May 10, 2017, S240584) __ Cal.5th __ [2017 Cal. LEXIS 3354].) In *Padilla* and *Arzate*, the Supreme Court raised two issues: whether *Miller* bans a sentence of life without the possibility of parole on a specific class of juvenile offenders (*Padilla, supra*, __ Cal.5th __ [2017 LEXIS 606]), and whether *Miller* created a presumption against a sentence of life without the possibility of parole for juvenile offenders. (*Arzate, supra*, __ Cal.5th __ [2017 Cal. LEXIS 604 at p. *1].) Before reaching a decision in either matter, the Supreme Court dismissed the cases as moot in light of Senate Bill No. 394. (*People v. Padilla* (June 13, 2018, S239454) __ Cal.5th __ [2018 LEXIS 4130]; *People v. Mendoza* (June 13, 2018, S238032) __ Cal.5th __ [2018 Cal. LEXIS 4156].) After doing so, it transferred the matter to this court to consider whether the present matter similarly

³ The Supreme Court denied the petition for review as to Albert Arzate, but it granted the petition as to Johnny Mendoza. (*Arzate, supra*, __ Cal.5th __ [2017 Cal. LEXIS 604].)

is moot. The parties have submitted supplemental briefs following the transfer of the instant matter back to this court, and we now conclude the matter is moot.

DISCUSSION

Mootness

An issue is moot when an event occurs that makes it impossible for the court to grant any effectual relief if it decides in favor of the plaintiff. (*People v. DeLeon* (2017) 3 Cal.5th 640, 645; *People v. J.S.* (2014) 229 Cal.App.4th 163, 170 ["[A]n issue is moot if 'any ruling by [the] court can have no practical impact or provide the parties effectual relief.'"]) Subsequent legislation which modifies a statute may render moot the issues in a pending appeal. (*Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 799.) Courts have discretion to resolve an appeal that is technically moot if the issues involve important questions that affect the public interest and are capable of repetition yet evade review. (See *In re J.P.* (2017) 14 Cal.App.5th 616, 623.) Such is not the case here, as we explain.

Juvenile Sentences of Life Without the Possibility of Parole

The U.S. Supreme Court has held that the Eighth Amendment bars capital punishment for children (*Roper v. Simmons* (2005) 543 U.S. 551, 560) and mandatory LWOP sentences for nonhomicide, juvenile crimes. (*Graham v. Florida* (2010) 560 U.S. 48, 79; *Miller, supra*, 567 U.S. at pp. 470, 473, 476-477, 479.) The California Supreme Court similarly has held that sentencing a nonhomicide juvenile offender to a period of time that falls outside the offender's natural life expectancy violates the Eighth Amendment. (*People v. Caballero* (2012) 55 Cal.4th 262, 268.) However, the courts

have stopped short of prohibiting LWOP sentences for juveniles in homicide cases, instead requiring courts to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, at p. 480; see *People v. Franklin* (2016) 63 Cal.4th 261, 275.) In California, this requirement extends to juvenile homicide sentences that are the functional equivalent of LWOP. (*Franklin*, at p. 276.)

To fulfill this requirement, states are not required to relitigate sentences where juvenile offenders received a mandatory sentence of life without parole; "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Montgomery v. Louisiana*, *supra*, 577 U.S. ____ [136 S.Ct. at p. 736].) When a defendant is sentenced to LWOP or its functional equivalent, the defendant must have an opportunity to make a record of information at a youth offender parole hearing. (*People v. Rodriguez* (2018) 4 Cal.5th 1123, 1126.)

Penal Code section 190.5, subdivision (b)⁴ authorizes a trial court to impose either an LWOP term or a term of 25 years to life for a juvenile offender guilty of first degree murder with special circumstances who was between the ages of 16 and 18 at the time of the crime. In sentencing a youth offender under section 190.5, subdivision (b), a trial court must consider the *Miller* factors to determine whether the offender is "irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the

⁴ Statutory references are to the Penal Code unless otherwise specified.

'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Gutierrez, supra*, 58 Cal.4th at p. 1391.)

On January 1, 2018, Senate Bill No. 394 became effective, amending section 3051 to add subdivision (b)(4), which states, "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." Thus, even when a youth offender has been sentenced to LWOP for homicide, the offender must receive a youth offender parole hearing. This requirement applies retroactively, effectively eliminating an LWOP sentence from a practical standpoint. (See *People v. Lozano* (2017) 16 Cal.App.5th 1286, 1289.)

Analysis

Watson is entitled to a prison term that reflects a " ' "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" ' (*Miller, supra*, 567 U.S. at p. 479), while recognizing that 'prisoners who have shown an inability to reform will continue to serve life sentences' (*Montgomery, supra*, 577 U.S. at p. __ [136 S.Ct. at p. 736].)" (*People v. Lozano, supra*, 16 Cal.App.5th at pp. 1291-1292.)⁵ This

⁵ The California Supreme Court initially accepted a petition for review, but following the enactment of Senate Bill No. 394, the matter was dismissed as moot. (*People v. Lozano* (Aug. 29, 2018, S246013) __ Cal.5th __ [2018 Cal. LEXIS 6498].)

opportunity for release is met through meaningful parole consideration, as afforded by Senate Bill No. 394. (*People v. Lozano*, at p. 1291.) Although Watson has been sentenced to life without the possibility of parole, the amended section 3051, subdivision (b) ensures he will receive a youth offender parole hearing in his 25th year of incarceration, which will provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. (See § 3051, subd. (b).) Thus, Watson's claim that his LWOP sentence violates his constitutional rights is moot.

DISPOSITION

This appeal is dismissed as moot.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.